IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE

CRIMINAL WRIT PETITION NO. 1441 OF 2003

Mr. Sachindranath Dey,
Indian Inhabitant of Village Laldi,
Post Ghatshila, Dist. East Singbhum,
Jharkhand, presently residing at
Sayadhari Apartments, 4th floor,
B Type, Plot No.50, Sector 8,
Navi Mumbai.

....Petitioner.

Vs.

1. The Superintendent,
Mumbai Central Prison, Arthur Road,
Mumbai.

2. The Superintencdent, Yeravada Jail,
Pune.

3. State of Maharashtra,
through the Home Ministry,
Mantralaya, M Cama Road,
Mumbai-400032.

....Respondents.

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Ms. Maharukh Adenwalla with Mr. Y.M. Chaudhary for the Petitioner.

Mrs. A.S. Pai, A.P.P. for the Respondents.

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CORAM: R.M.S.KHANDEPARKAR &
R.S.MOHITE, JJ.

DATED: 29TH JULY,2004

ORAL JUDGMENT : (Per R.M.S. KHANDEPARKAR, J.)

1. Heard learned Advocates for the parties.

Perused the record.

2. The short but very important point which arise for consideration in this petition pertains to the methodology to be followed under Section 428 of the Criminal Procedure Code (hereinafter called as "the Code") for the grant of set off in relation to pre conviction-detention of the accused against the sentence of imprisonment on his conviction. Simultaneously other points which arise for consideration are that whether in the facts and circumstances of the case the petitioner was entitled to be released immediately on passing of the order dated 5.9.2003 by the learned Magistrate in Criminal Case No.134/P/2000, on account of entitlement of facility of grant of set off under Section-428 of the Code and that whether the petitioner was illegally detained for 45 days beyond the period for which he could have been made to suffer the imprisonment in terms of order passed in 32-cases namely Case Nos. 113, 112, 114, 141, 138, 134, 137, 135, 143, 115, 128, 125, 129, 118, 127, 136, 137 of 2001, 111 of 2002, 136 of 2000, 32 and 142 of 2003 wherein sentence imposed was directed to run concurrently in all the cases.

3. It is the contention of the petitioner that even though in terms of Section 428 of the Code, the petitioner was entitled for the benefit of set off in respect of detention in each of the above referred cases, the respondents had granted such set off only in one case viz. Case No.136 of 2001 for a period of 1-year 1- month and 15-days. The fact that the set off has been granted in relation to the pre-conviction detention undergone by the petitioner in only one case namely Case No.136 of 2001 is not in dispute. The contention of the respondents is that bearing in mind the provisions of law contained in Section 428 of the Code, the calculations done by the respondents in relation to the said set off in terms of the order passed by the Magistrate cannot be found fault with and the petitioner having been granted maximum set off of 1-year 1-month and 15 days, there was no illegal detention of the petitioner as sought to be contended by the petitioner.

4. The Section 428 of the Code reads thus :

> "428 : Period of detention undergone by the accused to be set off against the sentence of imprisonment:- Where an accused person has on

> conviction, been sentenced to imprisonment for a term, not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him, on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him."

5. Evidently the provision of law quoted above provides for setting off the period of detention undergone by the accused, either as under-trial prisoner or during the investigation of the case, against the sentence of imprisonment imposed on such accused on conclusion of the trial. That is the right assured to the accused as no one is liable to be denied of his liberty otherwise than in accordance with the procedure established by law. In fact, it is the mandate of Article 21 of the Constitution of India, that is what is found to be the foundation of the

provision of law comprised under Section 428 of the Code. In fact, the provisions of law under Section 428 of the Code are also in consonance with the Article 9 of the Universal Declaration of Human Right proclaimed by the General Assembly of United Nation on December 10th 1948. Article 9 thereof provides that no one shall be subjected to arbitrary arrest, detention or exile.

6. It is to be noted that when initially the Section 428 was incorporated in the Code for the year 1973, the expression "not being imprisonment in default of payment of fine" did not find place therein. However, consequent to the decision of the Apex Court in **Boucher Pierre Andre v. Superintendent, Central Jail Tihar, New Delhi,** reported in **AIR 1975 SC 164,** the said phrase came to be introduced in the said section. Otherwise, in terms of the said decision in Boucher’s case, set off was available not only against the substantive imprisonment but also in respect of imprisonment in default of payment of fine.

7. It is also to be noted that the entitlement of set off in relation to the pre-conviction detention in a case is an absolute right without any qualification or

restriction. Neither it is subject to any duration of the term of imprisonment imposed upon nor it depends upon the factors considered by the Court while imposing the sentence. The decision of the Apex Court in Boucher's case is very clear in that regard wherein it was held that "Section 428 is absolute in its terms. It provides for set-off of the pre- conviction detention of an accused person against the term of imprisonment imposed on him on conviction, whatever be the term of imprisonment imposed and whatever be the factors taken into account by the Court while imposing the term of imprisonment. It does not say that where the pre-conviction detention of an accused person has already been taken into account by the Court while imposing the term of imprisonment on conviction, no set-off of such pre-conviction detention shall be permitted, and if the Legislature has not introduced any such exception, we cannot read it into section by a process of judicial construction. To read such exception, would do violence to the language of the section and to read the words which are not left. That is clearly impermissible according to the well recognised cannons of construction." This decision was followed by the Apex Court in **Hardev Singh & Anr. v. State of Punjab, reported in AIR 1975 SC 179.**

8. Further in **Suraj Bhan v. Om Prakash & Anr., reported in AIR 1976 SC 648,** the Apex Court held that Section 428 does not contemplate any challenge to a conviction or a sentence but it confers a benefit on a convict reducing his liability to undergo imprisonment out of the sentence imposed for the period which he had already served as an under-trial prisoner.

9. The benefit of set-off relating to pre-conviction detention under Section 428 should not be misconstrued to mean that pre-conviction detention is equated with the imprisonment after conviction. This was clarified by the Apex Court in **Government of Andhra Pradesh & Anr. etc. v. Anne Venkateswara Rao etc.etc., reported in AIR 1977 SC 1096.** It was further held therein that Section 428 merely provides for set-off and it does not equate under-trial detention with imprisonment on conviction. It was ruled that "the provisions as to set-off expresses a legislative policy; this does not mean that it does away with the difference in the two kinds of detention and puts them on the same footing for all purposes."

10. Undoubtedly, the provisions of Section 428 of the

Code of Criminal Procedure would apply to the cases to which the provisions of the said Code apply and not to the cases where the trial is conducted before a special Court to which the provisions of the said Code do not apply, i.e. the Court Martials. That is a settled law in view of the Apex Court in **Ajmer Singh etc. etc. v. Union of India and Ors., reported in AIR 1987 SC 1646** wherein it was held that on examination of the relevant provisions of the Criminal Procedure Code and the Army Act including the corresponding provisions of Navy Act and Air Force Act makes it abundantly clear that Section 428 of the Code of Criminal Procedure can have no application whatsoever in respect of the persons convicted and sentenced by the Court Martial. Following the decision, it was further held by the Apex Court in **Bhuwneshwar Singh v. Union of India & Ors., reported in (1993)4 SCC 327** that there is neither any investigation nor any inquiry, nor trial under the Code of Criminal Procedure Code and as such the provisions of set off contained in Section 428 are not attracted to the cases of the persons convicted and sentenced by the Court- material to undergo imprisonment.

11. Section 428 further makes it clear that the benefit of set-off is restricted to pre-conviction

detention in the case in which the sentence of imprisonment is imposed and it does not relate to any other detention undergone by the accused in relation to any other matter or case. To put it in the words of the Apex Court in Anne Venkateswara Rao's case would be that "It is true that the Section 428 speaks of the "period of detention" undergone by an accused person, but it makes it clear that the period of detention which it allows to be set off against the term of imprisonment imposed on the accused on conviction must be during the investigation, enquiry or trial in connection with the "same case" in which he has been convicted."

12. The said provision of the law in Section 428 of the Code has been thus interpreted by the Supreme Court in **State of Maharashtra and another Vs. Vajakat alias Mubarak Ali reported in A.I.R. 2001 S.C. 2255** and therein it has been clearly ruled that the said section unambiguously indicates that the accused is entitled to the benefit of the period of detention which he has undergone during the investigation, inquiry and trial of the same case and not in any other case.

13. Undoubtedly, in the case in hand, the petitioner was involved in 32 cases and in respect of each case he had undergone detention for number of days, during the investigation and inquiry of those cases. It is not in dispute that the authorities have not taken into consideration the detention undergone by the petitioner in each of those cases for the purpose of grant of benefit of set off to the petitioner and the set off has been restricted to the detention in only one case wherein the petitioner had undergone detention for a period of 1-year 1-month and 15 days. Apparently, therefore, the methodology adopted by the respondents for the calculation as regards the entitlement of set off to the petitioner was totally wrong and not inconsonance with the provisions of law contained in Section 428 of the Code. Considering the calculations given by the petitioner in the petition and the affidavit vis-a-vis the order of the conviction in all the 32 cases and the period of detention prior to conviction undergone by the petitioner in each of the 32 cases, it is apparent that the petitioner was entitled to be released after having availed the benefit of set off under the said provisions of law on the day when the Magistrate had passed the order i.e. on 5.9.2003 itself. Assuming that for some

administrative reasons and for delay in delivery of necessary writ to the authorities, some time might have been lost in the process, even then the petitioner ought to have been released atleast day following the day of the order dated 5.9.2003 or atleast on the day following the said day. Undisputedly, the petitioner was released on 20.10.2003. There is no explanation except the fact that there was incorrect calculation in relation to the said entitlement of set off. In other words detention of the petitioner beyond 5.9.2003 till 20.10.2003 was unauthorised and illegal being contrary to the provisions of Section 428 of the Code and in violation of the fundamental right guaranteed under Article 21 of the Constitution of India. It is therefore, apparent that there was illegal detention of the petitioner for the period beyond 5.9.2003 till 20.10.2003.

14. In **Smt. Nilabati Behera alias Lalita Behera** v. **State of Orissa and Ors.** reported in AIR 1993 SC 1960, the Apex Court had ruled that "this Court and the High Courts being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of the jurisdiction under Article 32 and 226 of the

Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings.

15. The authorities being not entitled to detain any person otherwise than in accordance with the provisions of law and without following due procedure of law and there being clear violation of fundamental right of the petitioner guaranteed to him under Article 21 of the Constitution of India, the petitioner is justified in contending that the respondents should be ordered to pay compensation to the petitioner. However, in absence of detail evidence being available as regards the exact loss suffered by the petitioner on account of his illegal detention for about six weeks and considering the facts and the circumstances which are brought on record as well as to meet the ends of justice, in our considered opinion, sum of Rs.10,000/- (Ten thousand only) would be the justifiable amount as the compensation to the petitioner. This will not

preclude the authorities from taking appropriate action against the erring officer or officers as the case may be in the matter, responsible for illegal detention of the petitioner. The respondents are also at liberty to inquire and fix the responsibility in relation to the compensation ordered to be paid. The compensation shall be paid to the petitioner within a period of six weeks from today. Rule is made absolute in the above terms.

16. Having found that the petitioner was in illegal detention for the period from 6th September, 2003 till 20th October, 2003, in our opinion, in the peculiar facts and circumstances of the case, it would be appropriate and just to order compensation for violation of his fundamental right of personal liberty as guaranteed under Article 21 of the Constitution of India and we accordingly direct that the petitioner should be entitled to a sum of Rs.10,000/- as compensation for his illegal detention and we make order accordingly. We are clearly fortified in the view that we are taking in the matter by the decision of the Apex Court in Smt. Nilabati Behera’s case (supra).

17. All concerned to act on the copy of this order duly authenticated by the C.S./Sheristedar of this court.

(R.M.S.KHANDEPARKAR, J.)

(R.S. MOHITE, J.)

FARAD CONTINUATION SHEET NO
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Vs.
The Superintendent,
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Office notes, office Memoranda of Coram, appearance, Court's orders or directions and Registrar's orders. | **Court's or Judge's orders**

Ms. M. Adenwalla with Mr. Y.M. Chaudhary for the Petitioner.

Ms. A.S. Pai, APP. for the

Respondents.

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CORAM : R.M.S. KHANDEPARKAR &
R.S. MOHITE, JJ.
DATED : 29TH JULY,2004.

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. For the reasons separately recorded in the oral Judgment, this court passed the following order.

1. Rule is made absolute in the above terms.

2. Having found that the petitioner was in illegal detention flor the period from 6th September,2003 till 20th October 2003, in our opinion, in the peculiar facts and circumstances of the case, it would be

(R.M.S. KHANDEPARKAR, J.)

(R. S. MOHITE, J.)